NOTES

THE POWER OF THE COURT TO DETERMINE WITNESS CREDIBILITY: A PROBLEM IN DIRECTING A VERDICT FOR THE PROPONENT OF THE EVIDENCE

In every United States jurisdiction some procedure is provided for the withdrawal of a civil case from the consideration of the jury and for determination of the controversy by the court.[1] Such a procedure, of course, is necessary to maintain the proper balance of functions between the fact-finding body, the jury, and the law-determining organ, the judge. When the course of a trial has been such that the evidence adduced will not support a finding that certain facts existed which under the law are necessary to impose or relieve of liability, the case must be withdrawn rather than permit the jury to mold the law according to their own *ad hoc* notions. The most widely recognized situation for withdrawal is that in which the party with the burden of proof has failed to produce satisfactory evidence of all the elements necessary to establish his cause of action or affirmative defense.[2] In making a motion to withdraw the case from the jury here, the defendant, if he is the challenging party, hypothetically admits the truth of all the evidence which is favorable to the plaintiff's case. The court is then requested to determine whether the facts which may be reasonably inferred from this evidence are such as may make the defendant liable for the damages which the plaintiff has sustained.[3] Similarly, when the allegations of the plaintiff's cause of action have been admitted in the pleadings and the defendant in-

1. 9 WIGMORE, EVIDENCE §§ 2494-95 (3d ed. 1940). For convenience in this Note the term "directed verdict" is used to connote that procedural device whereby the court enters the verdict without submitting the case to the jury. In some jurisdictions the procedure differs, but the result achieved is identical. In Virginia, for example, the court is not permitted to "direct a verdict," but it may enter judgment notwithstanding the verdict after the case has been submitted to the jury. VA. CODE ANN. § 8-352 (1957). Louisiana appears to be the only jurisdiction in which a motion to withdraw the case from the jury constitutes a waiver of the party's right to proceed with his case in the event of an adverse ruling. Bartholomew v. Impastato, 12 So. 2d 700 (La. Ct. App. 1943).

2. 9 WIGMORE, EVIDENCE §§ 2494-95 (3d ed. 1940).

3. Formerly, in determining whether a party had introduced sufficient evidence to constitute a prima facie case or affirmative defense, the court demanded only a "scintilla" of evidence, *i.e., any* evidence tending to support the requisite facts. This doctrine has been generally abandoned, and the prevailing view today is that a party must produce "substantial" evidence of the elements necessary to his case. Translated into practice the doctrine of "substantial evidence" simply means that, while evidence might be sufficiently probative to be admissible when presented, to warrant its submission to the jury it must be such that "reasonable persons" might fairly infer from it the ultimate facts. Smith, *The Power of the Judge To Direct a Verdict: Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 111, 114-15 (1924); Note, 10 WYO. L. REV. 164 (1956). See Galloway v. United States, 319 U.S. 372 (1943).

troduces evidence of an affirmative defense, the plaintiff as the moving party admits the truth of the defendant's evidence and requests a determination of whether the facts reasonably inferable therefrom are sufficient to relieve his adversary of the liability which was previously admitted. The question posed by such a motion is purely one of law. If the court finds that the only facts which may be supported by the evidence are insufficient, it must immediately decide the controversy. The determination of the verdict is here withdrawn from the jury simply because the course of the trial has been such as to call for no function which that body is capable of performing. No inquiry need be made into the trustworthiness of the testimony introduced; regardless of what the jury might consider to have actually been proven, the most favorable finding for the challenged party could not alter the result of the case.

In theory this might appear to be the only situation in which the court could properly withdraw the case from the jury. If the party moving for withdrawal does not challenge the legal sufficiency of his opponent's case, but requests the court to direct the verdict on the basis of evidence which the moving party has introduced, a fact issue is necessarily presented. The verdict must turn on a finding of the accuracy of the movant's evidence. The resolution of such factual issues has traditionally been considered to be within the exclusive ambit of jury function.[4] Ofttimes, however, the course of the trial is such that the evidence of one party is either undisputed and unimpeached by contrary evidence, or the opposing evidence is of such a minimal quality that upon comparison it would seem that reasonable minds could reach but a single factual conclusion. Since the court, in determining the legal sufficiency of an opponent's case, makes inquiry into the question of whether there is evidence from which the jury might reasonably find the necessary facts to allow the cause of action,[5] it might be argued that when there is no reasonable basis in the evidence for rejection of testimony offered, the court should similarly refuse to permit the jury to arbitrarily do so. The traditional answer to this contention is a doctrinaire one: that the peculiar factual issue of the credibility of witnesses is a matter absolutely within the province of the jury,[6] and the court may not interfere in its determination. Notwithstanding this general rule, there are a number of special situations and particular types of cases in which even the most orthodox courts will create an exception and will withdraw the case from the jury. A very few jurisdictions have entirely rejected the traditional doctrine and its exceptions, and now provide for the resolution of all civil cases by the trial judge whenever the *weight* of the evidence is such that a new trial would have been granted in the face of a contrary verdict. It is the purpose of this Note to explore and analyze the variety

4. 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940).

5. See note 3 *supra*.

6. MacDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944); 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940).

of contemporary doctrines concerning determination of credibility of witnesses as they particularly relate to the procedural rules governing the direction of a verdict for the proponent of the evidence.

THE RULE AGAINST DIRECTING A VERDICT FOR THE PROPONENT OF THE EVIDENCE AND ITS EXCEPTIONS

The doctrine which commits the determination of the credibility of witnesses to the jury is no flexible procedural concept but an absolute direction to invest the triers of fact with sole responsibility. Allegations are not established by the introduction of evidence until the jurors have approved the reliability of the testimony. Even if the evidence is not opposed or contradicted, the opposing party may rely on the jury's supposed ability to recognize inherent testimonial inaccuracy and simply reject it as untrue. A case representative of the strictness with which the doctrine is applied is *MacDonald v. Pennsylvania R.R.*[7] This was an action brought for the wrongful death of a nine-month-old child who was killed in a derailment of defendant's train. The plaintiff proved no more than the fact that the child was a passenger on the railroad and that he met his death because of the derailment, relying on the presumption of negligence raised by the doctrine of *res ipsa loquitur*. The defendant then introduced evidence showing that the track had been deliberately dismantled at the point of derailment by unknown saboteurs and that this action, for which the railroad was not responsible, was the sole cause of the accident. Seventeen witnesses who examined the track at this point testified concerning conditions that clearly indicated sabotage. A loose rail was found lying in the center of the tracks; the bolt holes on the rail were "clean and even"; the spike holes at the rail's original position were similarly "clean," and the angle bars, spikes and bolts which had been removed were found in a location directly opposite to their normal position and undamaged, lying together with the claw bar and wrench with which the loose rail had obviously been removed. The plaintiff made no attempt to impeach these witnesses or to otherwise cast doubt on the accuracy of their testimony. The trial court entered judgment *n.o.v.* for the defendant but was reversed on appeal. While under the Pennsylvania view the presumption of negligence merely shifted to the defendant the burden of coming forward with credible evidence to explain the accident, the evidence introduced could not be considered "credible" until the jury had approved it.[8] The defendant was clearly held

7. 348 Pa. 558, 36 A.2d 492 (1944).

8. 348 Pa. at 565, 36 A.2d at 492. It should be noted that this attitude towards the function of a presumption is somewhat peculiar to this state. It is to be distinguished from the orthodox Thayer view that a presumption casts only the burden of coming forward with evidence on the opposing party, and upon the introduction of such testimony the presumption "disappears from the case." Nor is it the more generally accepted doctrine expressed in MODEL CODE OF EVIDENCE rule 13 (1942) that the effect of a presumption is to cast the burden of persuasion upon the opponent. Pennsylvania law in its treatment of certain presumptions has been characterized as following the Thayer view (of shifting the burden of going forward with the evi-

to be entitled to a new trial because the verdict was against the weight of the evidence,[9] but the court was not authorized to enter final judgment.

Many jurisdictions which follow the general rule that credibility is an issue exclusively for jury determination have developed a series of exceptions which permit the direction of a verdict for the proponent upon the introduction of certain types of evidence or in certain types of cases. For example, some courts have taken the position that negative evidence of the non-existence of a fact may not stand in the face of positive evidence of the existence of that fact; others provide that the jury may not disregard uncontradicted evidence. A few courts have developed a special rule for the direction of a verdict for the proponent of the evidence in actions for medical malpractice, and many jurisdictions permit such a procedure in malicious prosecution cases. In applying these doctrines, however, the courts frequently avoid all mention of witness credibility. The unusual procedure is treated as if dictated by a separate rule of law, with the courts either not recognizing or not attempting to resolve the implicit conflict between these doctrines and the general rule as to the scope of the jury's function. The opinions, if they discourse further than to baldly state the rule applied, often justify the court's action on grounds of a public policy in favor of particular types of litigants or on grounds of the peculiar persuasiveness of particular types of evidence. These rationales, it would seem, go more to the question of whether the jury may be trusted to return a verdict which actually reflects their fair and honest evaluation of the accuracy of the evidence. This is a consideration applicable to all cases alike and the institution of jury trial in general, and does not address the basic question of whether there is something peculiar in the course of the presentation of the evidence in these trials which makes the credibility of the witnesses a less controverted question of fact than in other cases. If there are such qualities in these cases, it would seem that they should be recognized and treated similarly whenever they appear. In describing the various doctrinal exceptions to the general rule, an attempt will be made to discover whether such qualities do exist and whether they might properly be given a more general application.

Negative Versus Positive Evidence

Let us first consider the rule that evidence of a negative character, *i.e.*, evidence that something did not occur or did not exist, may not stand in the face of contrary positive evidence of the fact. This doctrine has been detected in the decisions of three jurisdictions.[10] The common case for

dence) with the added qualification that more than mere rebutting witnesses need be presented. The jury must find such testimony credible before the burden of producing evidence is satisfied. See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes,* 103 U. PA. L. REV. 1, 10-20 (1954).

9. See text accompanying note 53 *infra.*

10. All of these cases, except where otherwise indicated, involved the question of whether lights were shown, or bell and whistle sounded by a railroad at a grade

its application is that in which the plaintiff in a negligence action establishes a prima facie case by the testimony of witnesses to the effect that they were in a position to observe a particular occurrence had it taken place, but that they failed to observe it, *e.g.*, they heard no train whistle at a crossing or they saw no lights on an automobile before an accident. In many situations this is the best possible evidence of the particular act of negligence which is available to the plaintiff. Defendant then introduces witnesses who testify that they did observe the thing to occur. Those courts applying the rule would then hold that, since negative testimony may not be permitted to stand in the face of sworn positive testimony by witnesses whose credibility is not attacked or otherwise suspicious, the plaintiff has failed to establish a case entitling him to go to the jury.[11] Analysis will reveal, however, that the evidence introduced by the plaintiff would have withstood a motion for nonsuit at the close of his case, or would have been sufficient to support a verdict for plaintiff had defendant introduced no evidence. It is then clear that the verdict is directed solely on the basis of the evidence introduced by the defendant which the jury is not permitted to reject; the court has determined its testimonial accuracy.

It is diffcult to understand the basis for this doctrine. Certainly there is no particular charm to positive testimony which insures its reliability. Although there may be some element of probability that a person who failed to observe an occurrence did so because of inattention or faulty perception rather than because of its non-existence, that is hardly a conclusive indication of the accuracy of the opposing testimony. In practical operation, however, the rule seems to be invoked in cases where the positive evidence, aside from this quality, is otherwise peculiarly persuasive. In most of the cases, the plaintiff's evidence was presented by one or two witnesses who admittedly were not paying close attention while the opposing party produced a number of persons who, without any apparent interest in the controversy and who appeared to have been in a position to have observed the thing in question, claimed that it actually occurred. In one case,[12] for example, the fact in issue was the size of the tread of some steps from which the plaintiff fell. While all plaintiff's witnesses guessed at the size on the basis of their observations, only defendant had taken actual measurements. No reason appeared why plaintiff had not similarly prepared her case. Applying a variation of the negative-positive rule, the court held that "mere guesses" could not stand in the face of positive sworn testi-

crossing. Franklin v. Minneapolis, St. P. & S. Ste. M. Ry., 179 Minn. 480, 229 N.W. 797 (1930); Milk House Cheese Corp. v. Chicago, B. & Q.R.R., 161 Neb. 451, 73 N.W.2d 679 (1955); Nanfito v. Chicago, B. & Q.R.R., 103 Neb. 577, 173 N.W. 575 (1919); Williams v. Pittsburgh, 349 Pa. 430, 37 A.2d 540 (1944) (whether fire engine sounded siren and bell); Haskins v. Pennsylvania R.R., 293 Pa. 537, 143 Atl. 192 (1928); Jorgenson v. Minneapolis, St. P. & S. Ste. M. Ry., 231 Minn. 121, 42 N.W.2d 540 (1950) (dictum). *But see* Costack v. Pennsylvania R.R., 376 Pa. 341, 102 A.2d 127 (1954) (indicating that this doctrine may be dying or dead in Pennsylvania).

11. *Ibid.*

12. McIntyre v. Pittsburgh, 238 Pa. 524, 86 Atl. 300 (1913).

mony as to the actual measurement, and, finding that the size thus proved showed no negligence in construction, it directed the verdict for defendant. The slim reed on which the court's logic in these cases might rest is that when two opposing sets of testimony are presented and there is no reason to suspect the sincerity of either, but the evidence might be more readily harmonized on the theory that some witnesses merely failed to properly observe the occurrence (of which the failure to perceive is itself some evidence) than on a theory that the other witnesses were insincere (of which there was no indication), it is unreasonable to permit the jury to find otherwise. This, then, is to say that where there is some basis in the evidence for one conclusion, and no basis for another, the one which finds support must prevail. This rationale is seen to underlie some other doctrines which provide for court determination of the question of credibility, as will be presently discussed,[13] and if it properly explains the courts' actions here, the "negative-positive" dogma may be merely a clumsy mode of describing a particular situation in which the courts believe that that more general rule is applicable. The assumption, however, that the failure to perceive is itself some indication of faulty perception seems tenuous at best and hardly an impelling reason to withdraw the question of witness sincerity from the jury.

The Medical Malpractice Cases

Another exception to the general rule has been applied by a few courts in the determination of actions for medical malpractice. Under the substantive law of this action the plaintiff must establish the standard of reasonable care by which the defendant's conduct is to be measured.[14] This standard is usually defined as that course of medical conduct which is approved by competent and reputable men of the profession of the same school of medicine and practicing in the same community as the defendant.[15] In a carefully prepared case both plaintiff and defendant will introduce qualified practitioners to testify as to whether the questioned treatment was or was not in accordance with acceptable practice. If defendant's witnesses are believed, a complete defense has been established. The law refrains from resolving questions of medical propriety. Not only does the matter involve technical understanding which may overly tax the competence of judges and lay jurors, but recognizing that the state of the art is such that physicians from varying schools frequently as firmly believe in the misguidance of the medical theories of other schools as they are convinced of the healing powers of their own practices, the court will not enter the arena of technical medical controversy.[16] So long as respectable physicians honestly believe

13. See text and notes accompanying notes 41-45 *infra.*

14. PROSSER, TORTS 133-34 (2d ed. 1955); Note, 35 MINN. L. REV. 186 (1951).

15. PROSSER, *op. cit. supra* note 14, at 133-34.

16. It should be noted that this doctrine is restricted to those cases arising out of a patient's treatment by a physician which involves a question of technical medical

that the treatment which was administered is medically sound, it becomes entirely irrelevant that other physicians consider the conduct harmful. Upon such a record, however, most courts would refuse to withdraw the case from the jury.[17] Only the evidence favorable to the challenged party may traditionally be considered on such a motion, and plaintiff has established a prima facie case. The jury must determine the trustworthiness of the defendant's doctors' testimony. But said the Wyoming Supreme Court in *Smith v. Beard*,[18] affirming a directed verdict for the defendant, although this rule is ordinarily correct for most cases,[19] since the substantive law here only demands that the physician's

> "course be approved by a respectable minority of the profession, it would seem that it should make no difference whether that approval appears in the case in chief made by plaintiff, or by evidence introduced by the defendant. In fact it is difficult to see how the rule could be effectually applied otherwise." [20]

This attitude has been expressed by several other courts[21] which similarly except this particular type of case from the general rule prohibiting the direction of a verdict based on the moving party's own evidence. On analysis, however, if there is any validity to the strict application of the "credibility" doctrine in other cases, it would seem to make a great deal of difference whether the evidence absolving the defendant from liability "appears in the case in chief made by plaintiff" (whereupon plaintiff might be bound by the testimony of his own witnesses[22]) "or by the evidence introduced by the defendant" (when the credibility of the latter's witnesses the plaintiff is presumed to deny). The substantive law of medical malpractice, as it relates to the problem of determining the credibility of the challenging party's witnesses, does not materially differ from the law of

technique. Where the injury results from a physician's conduct which is within the common knowledge of laymen, and thus within their field of competence to understand and appreciate, negligence is determined by the usual "reasonable man" standard without the aid of professional testimony as to the standard of care. See Ales v. Ryan, 8 Cal. 2d 82, 64 P.2d 409 (1936) (failure of doctor to remove sponge left in patient's abdomen during operation); Evans v. Roberts, 172 Iowa 653, 154 N.W. 923 (1915) (part of patient's tongue cut off in removing adenoids); Johnson v. Ely, 30 Tenn. App. 294, 205 S.W.2d 759 (1947) (needle left in patient's abdomen during operation for appendicitis); PROSSER, TORTS 134 (2d ed. 1955).

17. Phillips v. Stillwell, 55 Ariz. 147, 99 P.2d 104 (1940); Sales v. Bacigalupi, 47 Cal. App. 2d 82, 117 P.2d 399 (Dist. Ct. App. 1941); Sim v. Weeks, 7 Cal. App. 2d 28, 45 P.2d 350 (Dist. Ct. App. 1935); Tomer v. Aiken, 126 Iowa 114, 101 N.W. 769 (1904); Stohlman v. Davis, 117 Neb. 178, 220 N.W. 247 (1928); White v. Burton, 180 Okla. 499, 71 P.2d 694 (1937).

18. 56 Wyo. 375, 110 P.2d 260 (1941).

19. 56 Wyo. at 394, 110 P.2d at 265.

20. 56 Wyo. at 400, 110 P.2d at 267.

21. Remley v. Plummer, 79 Pa. Super. 117 (1922); Blankenship v. Baptist Memorial Hosp., 26 Tenn. App. 131, 168 S.W.2d 491 (1942); Dahl v. Wagner, 87 Wash. 492, 151 Pac. 1079 (1915). See also extensive citation in Smith v. Beard, 56 Wyo. 375, 110 P.2d 260 (1941).

22. See 3 WIGMORE, EVIDENCE §§ 896-905 (3d ed. 1940).

any other action wherein affirmative evidence established by the defendant will effect a complete bar to recovery. The argument that the substantive law in this case "could not be effectually applied otherwise" than by refusing to permit the jury to return a verdict contrary to that which the court believes is demanded by the evidence would seem to apply to innumerable cases. What is significant about the malpractice case, however, is that the verdict generally does not turn on a choice between directly conflicting evidence. The testimony of plaintiff's experts relates only to their own personal experience in their practice of medicine, which is not in the least inconsistent with a contrary experience by other physicians. It is not a case where a finding that one set of witnesses testified accurately and truthfully demands that the opposing witnesses be found inaccurate or untruthful. Furthermore, the rule is not absolute, automatically calling for a defendant's verdict upon the introduction of favorable expert testimony, but as in the doctrine discussed in the previous section,[23] its application is conditioned on a finding by the trial judge that "there is nothing . . . to indicate that the approval by defendant's witnesses is not honestly made. . . ." [24] If this is a proper procedure here, it would seem that the same kind of determination might be made in other cases, and the court given like authority to withdraw the controversy from jury consideration. However, what may lead these courts to invoke the rule specially here is that the particular respectability of the defendant's witnesses in the malpractice cases serves to strikingly emphasize the absence from the evidence of any indication which might serve as a reasonable basis for doubt as to their testimonial truthfulness.

The Malicious Prosecution Cases

A doctrine similar to that found in the medical malpractice cases, but far more universally applied, is found in malicious prosecution cases. To gain recovery in such an action the plaintiff, who was innocent of any crime, must prove that the defendant maliciously and without probable cause instituted criminal proceedings against him.[25] Probable cause is defined as knowledge of such circumstances as might reasonably lead a person to suspect the guilt of the accused.[26] Quite properly the court must set the minimum standard of the degree of proof which must come to the attention of a citizen before he may turn the wheels of justice against one of his fellows. The government encourages private prosecution as a means of law enforcement, and the court must declare when citizens may bring charges without liability for unintentional inaccuracy. So it is generally held; the legal issue of what situations are sufficient to constitute probable cause is a matter for the court's determination.[27] Most jurisdictions go further, how-

23. See text and note accompanying note 11 *supra.*
24. Smith v. Beard, 56 Wyo. 375, 406, 110 P.2d 260, 270 (1941).
25. PROSSER, TORTS 645-46 (2d ed. 1955).
26. *Id.* at 652 and cases cited therein.
27. *Id.* at 658.

ever, and generally provide that when defendant's evidence tending to show probable cause is uncontradicted and unimpeached, not inherently improbable or suspicious, the factual as well as the legal question shall be determined by the trial judge.[28] Evidence on this issue almost invariably proceeds from the defendant's own witnesses, and the doctrine is frankly designed to permit the direction of the verdict for that party.[29]

The justification for this unusual procedure is frequently expressed in terms of a public policy in favor of persons who perform their civic function of reporting those suspected of crime.[30] Government officials at the highest level are afforded absolute immunity from liability for erroneous prosecutions;[31] lesser officials and private citizens ought to be protected from unwarranted liability to the fullest measure that the law can devise. By contrast, the innocent individual who is subjected to the criminal process is unfortunately injured and an appealing object for compensation. Recognizing that the jury's determination of credibility is frequently a mask to cover their desire to shift the loss to a person who they believe can better afford it and who they believe should be required to contribute,[32] the courts feel that the state's interest in encouraging honest efforts at law enforcement is too great to permit an improper resolution of these cases. The trial judge, then, assumes the role of evaluating the testimony himself. This procedural justification—based on the type of defendant involved rather than solely on the convincing character of the evidence itself—is directed towards an issue disassociated from the question of whether accurate determination of credibility may best be made by the jury. The problem to which it is addressed is whether the ambit of proper jury function includes something more in the application of the law than a pure determination of what conduct or occurrence actually took place. This is the notion that underlying the traditional procedural doctrine requiring the submission of

28. Wolter v. Safeway Stores, Inc., 153 F.2d 641 (D.C. Cir. 1946); Green v. Norton, 233 Ala. 489, 172 So. 634 (1937); Wm. R. Moore Dry Goods Co. v. Mann, 171 Ark. 357, 284 S.W. 42 (1926); Montgomery Ward & Co. v. Pherson, 129 Colo. 502, 272 P.2d 643 (1954); Norman v. Young, 35 Ga. App. 221, 132 S.E. 414 (1926); Butler v. Lewis, 318 Ill. App. 225, 47 N.E.2d 512 (1943); Dickson v. Young, 208 Iowa 1, 221 N.W. 820 (1928); Modla v. Miller, 344 Mich. 21, 73 N.W.2d 220 (1955); Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 74 S.W.2d 805 (1934); Wendel v. Metropolitan Life Ins. Co., 83 Mont. 252, 272 Pac. 245 (1928); Kersenbrock v. Security State Bank, 120 Neb. 561, 234 N.W. 419 (1931); Kearney v. Mallon Suburban Motors, Inc., 135 N.J.L. 457, 52 A.2d 692 (Ct. Err. & App. 1947); Southern Ice & Util. Co. v. Bench, 179 Okla. 50, 64 P.2d 668 (1937); Miller v. Pennsylvania R.R., 371 Pa. 308, 89 A.2d 809 (1952); Brusco v. Morry, 54 R.I. 108, 170 Atl. 84 (1934); Freezer v. Miller, 163 Va. 180, 176 S.E. 159 (1934); Pallett v. Thompkins, 10 Wash. 2d 697, 118 P.2d 190 (1941); Pacific Nat'l Co. v. Southwest Fin. Co., 4 Cal. App. 2d 326, 40 P.2d 862 (Dist. Ct. App. 1935) (dictum); Fowler v. Ruebelmann, 65 Idaho 231, 142 P.2d 594 (1943) (dictum); Barnes v. Danner, 169 Kan. 32, 216 P.2d 804 (1950) (dictum); (Blue) Star Serv., Inc. v. McCurdy, 36 Tenn. App. 1, 251 S.W.2d 139 (1952) (dictum).

29. See Curley v. Automobile Fin. Co., 343 Pa. 280, 23 A.2d 48 (1941).

30. See *id.* at 286-87, 23 A.2d at 51-52 and authorities there cited.

31. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

32. See Chesapeake & O. Ry. v. Martin, 283 U.S. 209, 216 (1931).

cases to the jury, nominally for a determination of credibility, some of the harshness of the common law may be alleviated in individual and unusual cases.[33] This, of course, is to recognize a desirable quality in the jury's failure to follow the court's instructions on the law; that although the law may not differentiate between widows and opulent corporate enterprises, between blackguards and "sharps" and reasonable business entrepreneurs, it is not in the interests of society that those operating barely within the letter of the law be permitted to impose "unfair" burdens on others. Furthermore, it may be thought desirable to provide a democratic means whereby the popular will might have some expression in the face of lagging judicial application of contemporary notions of justice. Nowhere in court decisions is this attitude toward the jury's role so frankly reflected, albeit negatively, than in the malicious prosecution cases. In that particular cause of action, the courts believe that the interests of the state in preserving the extant definition of the cause of action are too serious to permit any legislative exercise by the jury.[34]

Even to assume the desirability of such a jury role in some cases, however, is not to argue against imposing some limitation on the tremendous freedom now permitted that body. There is no reason to believe that with such a limitation the judiciary will not more aggressively mold traditional legal concepts and create new ones to keep pace with the changing attitudes of our society. For example, if the general success of negligence plaintiffs with the jury is in part a popular expression that compensation should be awarded where the law declares that it should not, it would seem more fitting that the law should devise some more acceptable system, *e.g.*, a doctrine of comparative negligence. Doctrines of duress and consideration in the law of contracts may similarly demand revision and subdivision to more properly give desired relief in extraordinary situations. It may be seriously questioned whether, in terms of relative competence and realistic democratic expression, this function may not more adequately be performed by centering the entire responsibility on the judiciary. By attempting to compel the proper legal result in those cases where the evidence demands it, the harshness or undesirability of the substantive law would at least be impressively emphasized on that law-giving department of our government. Furthermore, it is submitted that picking and choosing among the various causes of action and parties litigant impedes the progress of the development of a new general procedure which will better balance the functions of judge and jury to assure more adequate protection to other persons who are equally deserving of the rights which the law presently provides.

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33. See CARDOZO, THE PARADOX OF LEGAL SCIENCE 41 (1928); Levin, *Equitable Clean-Up and the Jury*, 100 U. PA. L. REV. 320, 341-43 (1951).

34. The procedure followed by some courts in medical malpractice actions might be subjected to a similar analysis, *i.e.*, the interests of the state in encouraging physicians to develop their medical art are too important to permit the jury to impose unwarranted liability. This has never been expressed in any of the opinions and may well be criticized as unrealistic in this case.

Uncontradicted Evidence

Some jurisdictions have applied a more general exception to the "credibility" rule, providing that in *any* case where the evidence on the determinative fact issue is uncontradicted and unimpeached, not inherently improbable or suspicious for any other reason, the court shall withdraw the case from the jury and direct the verdict thus indicated.[35] In the terms with which this doctrine is defined it is logically unassailable. To declare that the jury should not be permitted to find testimony inaccurate in the absence of any indications of inaccuracy is to state the obvious. The question, however, is whether the court is capable of recognizing all the valid indications of evidential untrustworthiness which might have been credited by the jury. One assumption implicit in the orthodox procedural doctrine is that the bases for a proper evaluation of credibility are as yet so poorly established that there is more safety in reliance upon the collective experience of a number of jurors, theoretically a cross-section of the community, than to entrust this determination to a single individual, the trial judge. Indeed, the question of what are the manifestations of insincerity, faulty memory, improper perception, or inability to accurately communicate the information which the witness intends to convey has greatly perplexed the profession. What one man accepts as a prime indication of untrustworthiness another rejects as meaningless. Scientific investigation in this field has just begun, and the results of the limited experimentation which

35. Chesapeake & O. Ry. v. Martin, 283 U.S. 209 (1931); Deitz v. Greyhound Corp., 234 F.2d 327 (5th Cir. 1956); Nicholas v. Davis, 204 F.2d 200 (10th Cir. 1953); Castagno v. Occidental Life Ins. Co., 151 F. Supp. 78 (D. Utah 1957); Martin v. Industrial Comm'n, 75 Ariz. 403, 257 P.2d 596 (1953); City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952); American Nat'l Ins. Co. v. Caldwell, 70 Ariz. 78, 216 P.2d 413 (1950); Walters v. Bank of America, 110 Cal. 2d 46, 69 P.2d 839 (1937); Ritchie v. Long Beach Community Hosp. Ass'n, 139 Cal. App. 688, 34 P.2d 771 (Dist. Ct. App. 1934); GA. CODE ANN. § 110-104 (1937), Davis v. Akins, 85 Ga. App. 364, 69 S.E.2d 791 (1952); Williams v. Kelley, 78 Ga. App. 699, 51 S.E.2d 696 (1949); Fuller v. DePaul Univ., 293 Ill. App. 261, 12 N.E.2d 213 (1937); Lister v. Donlan, 85 Mont. 571, 281 Pac. 348 (1929); Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 126 A.2d 323 (1956); Walsh v. Sisters of Charity, 47 Ohio App. 228, 191 N.E. 791 (1933); Webb v. Aetna Cas. & Sur. Co., 194 Okla. 30, 147 P.2d 169 (1944); Yellow Cab Operating Co. v. Robinson, 187 Okla. 669, 105 P.2d 535 (1940); Bourne v. Maryland Cas. Co., 185 S.C. 1, 192 S.E. 605 (1937); Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585 (1929); Supreme Liberty Life Ins. Co. v. Pemelton, 24 Tenn. App. 576, 148 S.W.2d 1 (1940); Brown v. Maryland Cas. Co., 111 Vt. 30, 11 A.2d 222 (1940); 9 WIGMORE, EVIDENCE 306 (3d ed. 1940) and cases cited therein.

The prevailing authority on this question in Pennsylvania has been MacDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944) (see text at note 7 *supra*), which strongly affirmed the orthodox doctrine that the proponent's testimony must always be submitted to the jury for determination of credibility. There is some indication, however, in the recent decision of Waters v. New Amsterdam Cas. Co., 393 Pa. 247, 144 A.2d 354 (1958), that this jurisdiction may be moving toward acceptance of the "uncontradicted evidence" rule. The plaintiff in this case had successfully prosecuted a previous action against one Koch for injuries and wrongful death resulting from a collision with an automobile owned by one Dreistadt. Koch was the driver of the Dreistadt automobile. Plaintiff then brought this action against Dreistadt's insurer on the theory that the omnibus clause of the policy covered persons operating the automobile with the owner's permission. The insurance company denied liability on the ground that Koch had no permission to drive the automobile at the time of the accident. This was the sole issue of the case. Plaintiff introduced

has been performed indicate little more than the difficulty of the inquiry.[36] However, the complexity of the task of determining credibility in most cases need not preclude the existence of cases in which the danger of permitting the trial judge to make the evaluation is so small as to make it the more desirable procedure in view of the sometimes intransigent character of the jury. Let us consider the cases so as to evaluate the rule in its practice.

In some of the cases the evidence which is considered to be conclusive obviously relates to matters which are within the knowledge of the opposing party.[37] For example, in *Brown v. Maryland Cas. Co.*[38] the plaintiff brought an action to recover indemnity from his insurer for the embezzlement of goods by one of his employees. The plaintiff first discovered the loss of his property on July 26 when an inventory of the goods entrusted to this employee disclosed a shortage. The insurer, however, was not notified of the loss until November 17, and it was argued by the defendant that the failure to afford it notification within ten days of the discovery of the loss, according to the terms of their contract, avoided its obligation to indemnify. Under the substantive law, however, the insured was required to inform the defendant only after he had "knowledge" of a loss under the policy, not upon a mere "suspicion."[39] The determinative factual issue then was when did the plaintiff discover that the loss was caused by the peculations of the employee rather than from normal business inefficiency? Witnesses called by defendant came forward to testify that inventories had been con-

no direct evidence on this point but relied on the presumption of permissive use arising from proof of the insured's ownership. 393 Pa. at 250, 144 A.2d at 355. The defendant then introduced evidence indicating that Dreistadt had entrusted the automobile to the driver only to wax and polish it but with no authority to operate it, and the plaintiff cross-examined, attempting to shake the credibility of these witnesses. The trial court submitted the case to the jury which returned a verdict for plaintiff. On appeal, the supreme court held that the effect of the presumption of permission raised by proof of Dreistadt's ownership was "to require the defendant to come forward with credible evidence. The burden of persuasion on the issue of permission of the driver of the automobile remains with the plaintiff. . . . Therefore, when the defendant assumes his burden of going forward with the evidence on the issue of permission and presents evidence *clearly indicating that no permission was granted so that a jury could not reasonably find otherwise, then if the plaintiff fails to produce evidence that permission had been granted, the court should direct a verdict for the defendant.*" (Citing no cases.) 393 Pa. at 253, 144 A.2d at 357. (Emphasis added.) The court considered that in this case sufficient conflicts in the testimony of defendant's witnesses had been adduced by plaintiff's cross-examination to require the submission of the case to the jury. "The court may not direct a verdict for the defendant in such a case because the jury must have the opportunity to resolve the *conflicts* in the testimony of defendant's witnesses." 393 Pa. at 253 n.5, 144 A.2d at 357 n.5. (Emphasis added.) The court then cited *MacDonald* only for the proposition that a verdict in favor of the plaintiff may be set aside if the judge is satisfied that it represents a "caprious disregard of the evidence." Because of error in the trial court's charge to the jury, the majority ruled to reverse the judgment and order a new trial. Two justices, however, noted (without opinion) that they would enter judgment *n.o.v.*

36. See Levin, Evidence and the Behavioral Sciences (U. Pa. Law School, Institute of Legal Research, 1956) (mimeo.).

37. *E.g.*, Walters v. Bank of America, 110 Cal. 2d 46, 49 P.2d 839 (1937); Davis v. Akins, 85 Ga. App. 364, 69 S.E.2d 791 (1952); Webb v. Aetna Cas. & Sur. Co., 194 Okla. 30, 147 P.2d 169 (1944); Bourne v. Maryland Cas. Co., 185 S.C. 1, 192 S.E. 605 (1937).

38. 111 Vt. 30, 11 A.2d 222 (1940).

39. 111 Vt. at 34, 11 A.2d at 224.

ducted after July 26—on September 30 and on November 15. The insurance broker who had written the policy for plaintiff testified that the insured had called on him in the latter part of October and informed the broker that an employee was short in his inventory by a substantial amount and that the plaintiff was desirous of having either the employee or the defendant make good the loss. The plaintiff failed to dispute any of this evidence. Holding that "this testimony was direct and positive, and uncontradicted by cross-examination or by other testimony, facts or circumstances," clearly indicating that the plaintiff had knowledge of the insurable loss more than ten days before notifying the surety, the Supreme Court of Vermont reversed the judgment for plaintiff rendered by the jury in the court below, and remanded with instructions to enter judgment for defendant.[40] Of course, in terms of strict burdens of proof plaintiff had no obligation to come forward with evidence which related solely to the defense. On the other hand, as the matter concerned plaintiff's own personal history so that its truth or falsity could not have been without his knowledge, the apparent admission indicated by silence in the face of such testimony is difficult to gainsay. It does not make sense in such a situation to say that the jury may reject the evidence when the plaintiff himself has made no attempt to encourage such a finding while the means to do so were necessarily available to him.

On the other hand, there are cases in which the accessibility of contradicting evidence is not so clearly available to the challenged party. For example, the transaction involved may not have been one in which the party was personally involved and the only known witnesses are adverse. In such a situation the litigant's only course can be to rely upon the jury's rejection of this unfavorable testimony as untrustworthy. Even here, however, there may be substantial justice in withdrawing the case from the jury. In *Deitz v. Greyhound Corp.*,[41] for example, the plaintiff brought an action for wrongful death caused by the negligence of defendant's bus driver. Sufficient evidence of negligence was introduced by the testimony of the bus driver himself and a witness who claimed to have seen part of the transaction. The only evidence of contributory negligence, however, was the testimony of a number of bus passengers who related facts which, if true, would have precluded recovery. There was no indication that these persons were not in a position to adequately observe the occurrence, nor did they appear to have any interest in the outcome of the litigation. Their evidence was not circumstantial, so that varying inferences might be drawn from it, but direct as to the conduct of the plaintiff's decedent, so that it was necessary to have accepted or rejected it in its entirety. Yet clearly the plaintiff was not in a position to come forward with evidence which might serve as a basis for disbelief of the opposing witnesses. Nonetheless, the court directed the verdict for defendant.

40. 111 Vt. at 35, 11 A.2d at 225.
41. 234 F.2d 327 (5th Cir. 1956).

The question was simply whether it was more desirable to conclude the controversy on the basis of the substantial evidence which had been introduced or to permit the jury to return a speculative judgment as to the credibility of these witnesses based on no evidence at all. It is one thing to say that the indicia which truly reflect testimonial accuracy are not yet subject to articulate and supportable definition, but another to conclude that it is impossible to recognize a complete absence of any such indicia which even some responsible persons might consider probative. The major difficulty encountered in the determination of credibility is the question of value to be attributed to such factors as evidence of darkness at the time of the testified observance, age or youth of the witness, interest in the outcome of the litigation, etc. Some persons may believe that a witness who has a record of a past conviction of a felony is to be absolutely distrusted; another considers such evidence absolutely irrelevant to credibility. Similarly some may believe that observance of an occurrence from a distance of more than two hundred feet is so subject to inaccuracy as not to be worthy of consideration; others have greater or less respect for the capabilities of human faculties. This matter, however, goes to the question of what inference should be drawn from certain basic evidence. Where there is some logical relation between the inferable and the evidence, courts traditionally submit the question to the jury. Where there are no facts which might reasonably tend to indicate a necessary fact conclusion, the jury is not permitted to act. This is the basis for the orthodox nonsuit or directed verdict against the proponent of the evidence.[42] Why then could we not demand a "prima facie case" of incredibility before we permit the jury to summarily reject testimony?

There do not appear to be compelling reasons why even demeanor evidence might not be made subject to identical judicial scrutiny, recognizing that it alone may afford some basis for a determination of witness unreliability. Assuming that such emotional manifestations as nervousness, hesitancy in testifying, blushing, anger, and the like may have some relevance to the question of testimonial accuracy, the notion does not preclude the existence of cases in which no significant untoward appearances are presented by the witnesses. It is not necessary that the judge determine what particular conduct he personally believes to be fairly indicative on the question, but only that there were no signs which are commonly given any credit one way or the other by responsible persons. Unfortunately, although many of the cases refer to "circumstances which might cause the uncontradicted testimony to be regarded with suspicion," no opinion has offered an adequate discussion of the effect of demeanor evidence in the case. There is no reason to believe, however, that should counsel articulately point to any unusual or suspicious conduct on the part of the witnesses

42. 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940); Smith, *The Power of the Judge To Direct a Verdict: Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 111, 117 (1924).

which might have properly been considered by the jury, a directed verdict would not have been held improper. Not infrequently there are other circumstances in a case which tend to cast suspicion on particular testimony, and the courts have readily given them proper consideration in determining the conclusive character of otherwise uncontradicted evidence.[43] In *Ferdinand v. Agricultural Ins. Co.*,[44] for example, the plaintiff had brought an action against his insurer for indemnity for the alleged theft of some jewelry and other belongings from his parked automobile. The plaintiff and his wife testified that they had left jewelry in their automobile overnight and that when they returned to it, they found a window broken, the contents of the automobile in a state of disarray and all the valuable pieces of jewelry gone. The defendant offered no evidence at all. The trial court then directed a plaintiff's verdict. On appeal, reversing the judgment and remanding for new trial, it was held that although uncontradicted evidence even of an interested party may provide the basis for a directed verdict, the testimony must not be such as to give "too many pauses to the reasoning process" because of its inherent improbability or extraordinary character.[45] One significant circumstance here which peculiarly cast suspicion on plaintiff's case was the fact that only the valuable jewelry was allegedly stolen while the "thief" selectively passed over items of costume jewelry in the same packages.

THE NEW TRIAL STANDARD

Some jurisdictions have moved to the position that whether there be contradictory evidence or not, should the evidence on one side of the controversy be so "overwhelming" as to leave no reasonable doubt as to what were the actual facts, the court is authorized to direct the verdict.[46] In

43. See Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L.Q. 33 (1934); Note, 8 A.L.R. 769 (1920).

44. 22 N.J. 482, 126 A.2d 323 (1956).

45. 22 N.J. at 499, 126 A.2d at 333.

46. Pence v. United States, 316 U.S. 332 (1942); Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933); Southern Ry. v. Walters, 284 U.S. 190 (1931); Murray v. Towers, 239 F.2d 914 (D.C. Cir. 1956); McVeary v. Fidelity & Cas. Co., 87 F.2d 963 (5th Cir. 1937); J. D. Halstead Lumber Co. v. Hartford Acc. & Indem. Co., 38 Ariz. 228, 298 Pac. 925 (1931); *In re* Snift's Estate, 233 Iowa 800, 10 N.W.2d 550 (1943); Potter v. Robinson, 233 Iowa 479, 9 N.W.2d 457 (1943); Lee v. Lee, 248 Minn. 496, 80 N.W.2d 529 (1957); Lovejoy v. Minneapolis-Motive Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (1956); Forde v. Northern Pac. Ry., 241 Minn. 246, 63 N.W.2d 11 (1954); Kath v. Kath, 238 Minn. 120, 55 N.W.2d 691 (1952); Hanson v. Homeland Ins. Co., 232 Minn. 403, 45 N.W.2d 637 (1951); Grover v. John Hancock Mut. Life Ins. Co., 119 Vt. 246, 125 A.2d 571 (1956); Spaulding v. Mutual Life Ins. Co., 94 Vt. 42, 109 Atl. 22 (1920); VA. CODE ANN. § 8-352 (1957); Braswell v. Virginia Elec. & Power Co., 162 Va. 27, 173 S.E. 365 (1934); Flannagan v. Northwestern Mut. Life Ins. Co., 152 Va. 38, 146 S.E. 353 (1929).

New York at one time numbered among these jurisdictions with the adoption of § 457-a of the New York Civil Practice Act, N.Y. Sess. Laws 1921, ch. 372, reading: "The judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence." Section 457-a has now been amended to read: "The court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence." N.Y. CIV. PRAC. ACT § 457-a.

doctrinal terms this procedure is tied to the recognized standard for another and dissimilar device, long recognized by the common-law courts. In these jurisdictions it is held that whenever the balance of the evidence is such that the trial judge would feel compelled to order a new trial in the face of a particular verdict, he should immediately determine the controversy. The theory of this doctrine is that when considering the trial presentation as a whole there may be so much reason to doubt the evidence of one party and so little reason to disbelieve the opposing evidence that reasonable men could come to but a single conclusion, and the court will not then permit the jury to return a verdict which so strongly offends the court's sense of justice. In *Potter v. Robinson*,[47] for example, the plaintiff brought an action for wrongful death, alleging that one of defendant's drivers had negligently driven his truck so as to cross the highway center-line onto the east side and there collided with the decedent's automobile. The only surviving persons who observed the accident were members of the defendant's truck caravan who testified that the collision took place on their side of the road. They said that a pile of broken glass and dirt was found on that side of the pavement and that there were tire skid marks leading from it to the resting places of both the decedent's automobile and the truck. The local sheriff, his deputy and three other persons, unrelated and previously unknown to the parties, who arrived at the scene soon after the accident, gave identical testimony as to the appearance of the skid marks and the debris. Photographs taken at that time also showed these conditions and were introduced into evidence. One person testified for the plaintiff to the effect that he had arrived at the scene some time after the incident and that the debris and tire marks appeared to him to be on the east side of the highway. This witness also testified that it was dark at the time, that he did not have a flashlight and that he "didn't look around much that night." A lawyer who had been retained by the plaintiff to investigate the case testified that the defendant (who had not personally observed the collision) had admitted to him that the accident was caused by his driver's having crossed the center-line. This the defendant denied. The court directed the verdict for defendant. Affirming on appeal, the Supreme Court of Iowa, analyzing the evidence, held that except for the plaintiff's single witness all the witnesses unanimously agreed that the tire marks made by both vehicles clearly indicated that the point of impact was on the west side of the highway and that the "uncertain and equivocal testimony" of the opposing witness was insufficient "to raise a conflict." [48] Furthermore, the probative value of an admission made by a party some time after the accident, and which was not even purportedly based on personal observation, was too slight a reed to cast genuine doubt on the facts as represented by defendant. Should the jury have returned a verdict for plaintiff it would have been so greatly contrary to the weight of the evidence that it could not have been permitted

47. 233 Iowa 479, 9 N.W.2d 457 (1943).
48. 233 Iowa at 487, 9 N.W.2d at 461.

to stand, but defendant would have been entitled to a new trial. Under such circumstances the court should direct the verdict and conclude the controversy.[49]

Cases such as these argue strongly for the procedure applied by the court. Although the evidence might be said to be "contradictory" in the sense that there was variant testimony introduced which, considered separately, might indicate conflicting conclusions, evaluated as a whole there is little doubt as to how rational persons would react in making a similar decision concerning their own personal business affairs in the face of a like presentation. The mere fact that both sides introduce some evidence relating to the same ultimate fact and tending to indicate contrary conclusions, one being of relatively tenuous probative relevance and the other being clear and direct, should not be sufficient in every case to raise a reasonable issue as to credibility. Certainly in extreme cases the dangers inherent in a judicial determination of this question rather than in a jury determination are no greater than presented by cases of absolutely uncontradicted evidence, and fairness to the parties may call for a similar procedure.[50] However, by relating the inquiry to the standard designed for granting a new trial too sweeping a cure for the evil may be effected, including within the scope of the rule cases in which the dangers of jury consideration are not out-balanced by the benefits which may be obtained from it.

One notion which seems to underly the orthodox tradition of submitting questions of credibility to the jury is that a not insignificant factor in the evaluation of testimony is the trier's attitude toward the reliability of the type of person he believes the witness to be. Most of us, for example, would tend to reject out of hand the testimony of a "bum-in-the-park" when contradicted by a respectable member of the clergy. Our attitudes are in part molded by personal experience with a variety of persons and in part by social prejudices instilled in us by parents, teachers and associates. When determining the credibility of a witness, members of the bench are no less affected by their own upbringing and background of experience than others, while the varying social predispositions of the jury are somewhat neutralized by the collectivity of their decisional process. To illustrate this aspect of the problem let us consider the case of *Bank of United States v. Manheim*.[51]

This was an action brought by the plaintiff bank against the endorser of a note payable to the bank. The defense interposed was the bank's oral agreement with the principal debtor to cancel the obligation upon the debtor's assignment of his assets to the bank. The defendant and his son-in-law testified to the occurrence of the transaction. The plaintiff's officers, on the other hand, denied any such agreement and introduced evidence to show that the defendant had not requested formal cancellation of the note

49. 233 Iowa at 490, 9 N.W.2d at 462.

50. See text and notes accompanying notes 41-45 *supra*.

51. 264 N.Y. 45, 189 N.E. 776 (1934).

prior to five months after the alleged renunciation, while during this time the debtor was on the verge of bankruptcy and the defendant was solvent. Emphasizing this latter bit of evidence, the New York Court of Appeals affirmed the direction of a verdict for plaintiff, holding that "a verdict for the defendant, if rendered by a jury on such testimony would necessarily have to be set aside." [52] Little quarrel could be had with the court's decision that the weight of the evidence supported the bank's position. The defendant was not unversed in the ways of financial transactions so that he would not recognize the significance of permitting his written obligations to remain uncancelled, the dealings took place during the time of the great depression when businessmen were fighting desperately for their economic lives, and defendant's testimony as well as that of his only other witness were subject to severe suspicion on the ground of obvious personal interest. The plaintiff's officers, on the other hand, a generally respectable class of persons, were not so subject to the pressures of personal interest, and the seeming irregularity of the alleged transaction lends a substantial degree of credence to their testimony. However, the opposing testimony was all direct as to the ultimate facts in dispute; one set of evidence could not be accepted without absolute rejection of the other as untrue. Although the defendant's conduct was perhaps foolish and unusual, his testimony was not necessarily incredible. Individual members of the jury might well have drawn on their own personal experience and background and found far more likelihood of accuracy in this testimony than did the court. The very real contribution which the jury may afford in this regard, both for the purposes of obtaining fair and accurate judicial relief and of retaining the democratic flavor of common-law litigation, would seem to be too valuable to be lost. But while the course of the trial may not have been such as to properly call for the final determination of the rights of the parties by the court without the opinion of the jury, the case at the same time is a classic one for the granting of a new trial. Thus the different functions which that device and the directed verdict are designed to perform and the inadvisability of tying the operation of the one to the other are sharply illustrated.

The motion for new trial because the verdict is against the weight of the evidence is not a procedure intended to authorize the court to frustrate the entry of the verdict returned by the jury, but for use in cases where, the evidence having been peculiarly unbalanced, fairness and efficiency suggest the desirability of having another consideration of the case by a fresh jury panel.[53] To grant such a motion there need be much less than conviction on the part of the court that the verdict rendered was improper or unreasonable, but only a determination that the weight of the evidence appears to so strongly point toward a contrary finding that there is a significant likelihood that the present jury was either aberrational in per-

52. 264 N.Y. at 51, 189 N.E. at 778. Since the time of this decision the legislature has abandoned this standard for directing a verdict. See note 46 *supra*.

53. See Galloway v. United States, 319 U.S. 372, 400 n.9 (1943) (dissenting opinion); 9 WIGMORE, EVIDENCE 298-99 (3d ed. 1940).

sonality or its members were attempting to legislate a legal result in disregard of their honest opinion of the evidence. The level of persuasiveness of a party's evidence which is necessary to permit him another opportunity to convince a *jury* may be quite disparate from that which should be necessary to lead the court to a conclusion of absolute injustice in a verdict which is unfavorable to him. Nor does it follow that to refuse the court authority to enter a final judgment where it would not permit an initial jury verdict to stand is to "relegate the parties to a contest of endurance," as it has been characterized by some advocates of this standard for a directed verdict.[54] In several jurisdictions the legislatures have established limitations on the number of successive re-trials which may be ordered in a single action;[55] others achieve a similar result by judicial self-restraint.[56] At some point judicial evaluation must give way and the court recognize the fallibility of its own determination. This new trial device is designed basically to afford an adequate opportunity to the parties to present their cases to a fair and honest jury panel, not a medieval method of insuring that the court's conclusion as to facts will finally succeed.[57]

To recognize the value of retaining jury consideration of cases where the evidence realistically reflects an actual factual dispute, however, treats only half the problem. The new trial procedure is admittedly wasteful and cumbersome, and efforts should be made to keep the jury within the bounds of their authority in the initial trial and to encourage them to render verdicts based on their honest opinion of the evidence and faithful to the court's charge on the law. One aid in this regard might be a grant of more liberal authority for the court to comment on the evidence.[58] While not anticipating that the court could or should dissuade jurors from their own convictions, where a particular verdict appears unwarranted and unrealistic to the judge, his discussion of that fact may impress upon them their responsibility and make some less ready to subvert their honest opinions and join in a verdict designed to afford relief which is contrary to the law. It might also be politic to inform the jury of the court's power to grant a new trial in the face of an unreasonable verdict. It is hardly suggested that the triers of fact be threatened with judicial rejection of their verdict, but a jury made aware of the procedures which are available to render their decision ineffectual might well be further encouraged to follow the court's instructions on the law. Another device which may prove helpful would be in-

54. Smith, *The Power of the Judge To Direct a Verdict: Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 111, 122 (1924).

55. ALA. CODE ANN. tit. 7. § 277 (1941); ARIZ. R. CIV. P. 59(k); MISS. CODE ANN. § 1536 (1957); MO. ANN. STAT. § 510.330 (1952); OHIO REV. CODE ANN. § 2321.18 (1954); TENN. CODE ANN. § 27-202 (1955); VA. CODE ANN § 8-224 (1957); W. VA. CODE ANN. § 5662 (1955).

56. *E.g.*, Gutman v. Weisbath, 194 App. Div. 351, 185 N.Y. Supp. 261 (1920).

57. This is not to ignore the fact that some courts have made such use of the new trial procedure, although it would seem improper. See, *e.g.*, Meinreuken v. New York Cent. R.R., 103 App. Div. 319, 92 N.Y. Supp. 1015 (1905), which affirmed the setting aside of the jury's verdict for the fourth time!

58. See Note, 27 N.D.L. REV. 199 (1927).

creased use of special findings instead of the general verdict. Here again, there is some likelihood that a person might be more amenable to submerging his honest opinion of the factual matters involved in a general verdict for one party or the other than were he forced to be counted as finding a particular detailed fact against which his reason rebelled. It is noted that in the malicious prosecution cases, in which the courts have been exceptionally zealous in their efforts to insure that relief is afforded only where the law demands, this procedure has been encouraged for use in those cases where the verdict may not be directed.[59] As previously discussed,[60] the substantive law of this cause of action frequently provides that the court shall determine the factual question of probable cause only when the evidence is uncontradicted and unimpeached. When the facts of which the private prosecutor had knowledge and which induced him to prefer charges against the plaintiff are disputed by conflicting evidence, the question must be submitted to the jury. Some courts,[61] and the *Restatement of Torts*,[62] have recommended that the issue be tendered in the form of specific interrogatories, presumably under the theory that this procedure will aid in focusing the jury's attention on the specific factual matters whereas a request for a general verdict may tend to encourage consideration of the policy question of whether there ought to be compensation for the plaintiff.

Conclusion

It would seem that an absolute rule requiring the submission of the question of credibility to the jury is neither a desirable procedure for the resolution of all civil cases nor one faithfully and consistently applied by the courts in any jurisdiction. The limitations of both the judiciary and the jury are such that maximum benefits of the qualities that each may offer to the process of fact determination may more efficiently be obtained with greater fairness to the parties by some flexibility in the traditional doctrinaire roles assigned to them. Yet few courts—or legislatures—have undertaken an over-all evaluation of their procedural rules in this regard, contenting themselves with the creation of unrelated and sporadic exceptions to the orthodox doctrine for application in cases which particularly appeal to them. The few jurisdictions which have attempted the formulation of some more general rule may well have devised a cure too drastic for the evil involved. It is suggested that perhaps the solution may not properly lie in the establishment of definitive rules but in providing a procedure which relies in greater measure on the discretion of the trial judge. We might

59. See, *e.g.*, Baird v. Aluminum Seal Co., 250 F.2d 595, 601 (3d Cir. 1958); Biggans v. Hajoca Corp., 185 F.2d 982, 983 (3d Cir. 1950); Simpson v. Montgomery Ward & Co., 354 Pa. 87, 96-97, 46 A.2d 674, 680 (1946).

60. See text and note accompanying note 28 *supra*.

61. See note 59 *supra*.

62. Restatement, Torts § 673, comment *d* (1938).

authorize the court to direct a verdict when the evidence presented by one party is of peculiarly persuasive character, there being no basis in the courtroom presentation for regarding it with suspicion or doubt, *and the acceptance of such evidence would not a fortiori demand the rejection of the other party's evidence.* This situation might come about as well in the case of *uncontradicted* direct evidence as where the opposing evidence is of a low order of circumstantiality so that the testimony of the opposing witnesses need not be regarded as inaccurate but merely not indicative of some fact which would have otherwise been inferable. Such a doctrine approaches that applied by the most "liberal" jurisdictions, but may have the advantage of not encompassing the whole range of situations in which a new trial might properly be ordered but which are not meet for final judicial determination.

D. B.

THE USE OF CHAPTER X REORGANIZATIONS TO INCREASE INFORMED SHAREHOLDER PARTICIPATION IN REORGANIZED CORPORATIONS

INTRODUCTION

The first goal of a corporate reorganization is said to be "the production of a sound economic unit . . . able to operate its business successfully and pay a reasonable return to those having interest in it." [1] In reaching this goal, the first objective might be a recapitalization of the corporation's existing economic structure. However, in many instances recapitalization alone will not be sufficient, for the reason behind a corporation's financial distress may be directly attributable to its management.[2] Mismanagement is readily ascertainable in some instances,[3] while in many others it lies hidden beneath other alleged reasons for a corporation's financial difficulties.[4] The likelihood of its existence makes a second reorganization objective appear desirable—a shifting of the corporation's management and control. This process might be called "recontrolization."

Recontrolization through reorganization can serve two separate functions. First, it may serve to replace an old management responsible for much of the corporation's difficulty with a new and more competent management.[5] Second, it may serve to re-allocate the power to control the corporation through a distribution of voting rights to a new group of

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1. Gerdes, *General Principles of Plans of Corporate Reorganization*, 89 U. PA. L. REV. 39, 41 (1940).

2. See, *e.g.*, McKesson & Robbins, Inc., 8 S.E.C. 853, 855 (1941); Deep Rock Oil Corp., 7 S.E.C. 174, 177 (1940); 1 SEC REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES 2-3 (1937) (hereinafter cited as SEC STUDY). The desire to change management may also stem from reasons other than ineffectiveness. For example, new management may be needed because a holding company is being broken up, or because existing management has conflicting interests, or to interest new groups in the enterprise. 2 GERDES, CORPORATE REORGANIZATIONS 1652-53 (1936).

3. See, *e.g.*, McKesson & Robbins, Inc., *supra* note 2, at 855, where the corporation's difficulties were said to be largely due to the president's fraudulent activity.

4. See JEREMIAH, CAUSES AND PREVENTION OF CORPORATE BOND DEFAULT (1936), where the author made a detailed analysis of reasons given for bond defaults by eighty-six corporations. Insurable calamities, decreases in sales due to causes other than changes in demand, delay in collecting outstanding accounts, excessive inventory, excessive trade liabilities, high operating or production cost due to managament, high royalties payable, inadequate maintenance of property, overcapitalization, payment of high prices for property, strikes when position of management cannot be justified, and underfinancing are among the alleged reasons for bond default given. The author concludes that the above reasons are the direct results of ineffective management. *Id.* at 89-90.

5. Reorganization affords "a rare and signal opportunity for dislodging a management," 1 SEC STUDY 309 (1937), whereas such a task might have proved extremely difficult, if not impossible, had the corporation not gone through reorganization proceedings.

shareholders [6] and to increase the realization of this potential to control by the adoption of measures increasing informed shareholder participation in the governmental processes of the corporation.[7]

Informed shareholder participation is used in the limited sense of allowing the shareholder to take an active interest in determining broad policy affairs of the corporation and providing him with access to the information necessary for intelligent use of voting power. It does not mean that the board of directors should be abolished, allowing the shareholders, acting as in a simple political democracy, to take over the daily affairs of the corporation and reach decisions in a "town-meeting" type procedure.[8] However, it does mean that shareholders will have indirect control over these daily affairs by the power to elect directors who will be sensitive to shareholder desires because of a realistic threat of removal from office.

It is the purpose of this Note to determine and evaluate what measures of informed shareholder participation need be included in reorganization plans to meet Security and Exchange Commission and reorganization court standards of approval. A further attempt will be made to explore the question of what additional measures leading to an ideal system of shareholder participation might be adopted within the framework of existing statutory provisions. This will be done with a view toward those special problems that might be posed by a reorganization situation, and a further consideration of whether federal intervention in this field may be justified under the bankruptcy powers, as, for instance, on the ground that a reasonable relationship between informed shareholder participation and the likelihood of corporate financial stability may be found to exist.

CHAPTER X PROVISIONS GOVERNING FORMS OF MANAGEMENT AND CONTROL

Judicial examination into forms of management and control first came to have importance under the old section 77B of the Bankruptcy Act,[9] the statutory forerunner of the present chapter X.[10] Section 77B(f)(1) required that a plan of reorganization be fair, equitable and feasible.[11]

6. See, *e.g.*, Inland Gas Corp., 29 S.E.C. 377, 400 (1949), where the Inland trustee's plan provided that secured claimants were to receive bonds and class A shares in exchange for their secured claims. Thus there occurred a change in voting power, since class A shares could elect four out of five directors.

7. This subject has also been labelled "shareholder democracy," "corporate democracy," and occasionally "shareholder revolution."

8. See Garrett, *Attitudes on Corporate Democracy—A Critical Analysis*, 51 NW. U.L. REV. 310, 311 (1956). "[A]n attempt to equate stock ownership with political citizenship may lead to conclusions dangerous for the future of American corporate enterprise. Important as it is to develop measures to insure the responsiveness of management to the interests of shareholders of modern publicly-held corporations, it is even more important that they be efficiently managed. They cannot be efficiently managed by the shareholders collectively. . . ." *Id.* at 310.

9. Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 911.

10. 52 STAT. 883 (1938), as amended, 11 U.S.C. §§ 501-676 (1952) (Bankruptcy Act §§ 101-276) (hereinafter cited by U.S.C. section only).

11. Act of June 7, 1934, ch. 424, § 77B(f)(1), 48 Stat. 919.

Under this provision the qualifications of men proposed for the management of reorganized corporations, as well as the broader questions of where control over such corporations should reside, properly became the subject of judicial attention in a number of cases.[12] Thus, the courts inquired into the necessity and appropriateness of voting trusteeships and into the fairness generally of the allocation of voting power among different classes of security holders.[13] Appropriate judicial scrutiny on these issues, however, occurred only infrequently, and no pervasive reform could be attributed to section 77B.[14] A more specific approach to problems of management and control was instituted by chapter X. In addition to the broad requirement of section 221(2), carried over from 77B, that a plan be fair, equitable and feasible,[15] the courts are now directed by explicit mandate to make inquiries into certain particular matters of management and control.

Section 216(11) [16] of chapter X governs the selection of directors, officers or voting trustees. It provides that a plan of reorganization:

> "shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers, or voting trustees, if any, upon the consummation of the plan, and their respective successors."

Requirements for inclusion of certain provisions in the reorganized corporation's charter are set out in section 216(12).[17] This section requires the inclusion of:

> "(a) provisions prohibiting the debtor or such corporation from issuing non-voting stock, and providing, as to the several classes of securities of the debtor or of such corporation possessing voting power, for the fair and equitable distribution of such power among such classes, including, in the case of any class of stock having a preference over other stock with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends. . . ."

Subsection (b)(2) of this section further requires that a corporation's charter provide for periodic reports to security holders, including profit and loss statements and balance sheets.[18]

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12. 8 SEC STUDY 158 (1940).
13. *Ibid.*
14. *Id.* at 158-59.
15. 11 U.S.C. § 621(2) (1952).
16. 11 U.S.C. § 616(11) (1952).
17. 11 U.S.C. § 616(12)(a) (1952).
18. This requirement is somewhat limited. The reports need only be made annually, and then are limited to cases where the indebtedness, liquidated as to amount and not contingent as to liability, is $250,000 or over. 11 U.S.C. § 616(12)(b)(2) (1952). The information required seems to be related only to past and present economic status of the corporation, not to future plans and policies.

Omnibus "catch-all" authority is afforded by the broad language of section 216(14), which provides that a plan "may include any other appropriate provisions not inconsistent with the provisions of this chapter." [19] This section might be used as a basis for voluntary inclusion in the plan of forms of management and control which would foster informed shareholder participation. This is especially true since it is permissible to amend the corporation's charter to provide adequate means for the execution of the plan.[20] At the same time, it appears to give the courts an additional foothold in their power to strike down undesirable management and control provisions by a determination that they are inconsistent with the provisions of chapter X. However, this section has never been used in this context.

An alleged fault of the broad provisions of 77B was the court's lack of concern with the identity of the personnel constituting the new management, though it had power to make such inquiry.[21] Judicial scrutiny in this area is now mandatory under section 221(5).[22] This section provides that the judge shall confirm a plan if satisfied that:

> "(5) . . . the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy."

An additional provision that may have a bearing on types of management and control is section 172.[23] This section provides that in certain cases the judge shall,[24] and in others may,[25] submit plans worthy of consideration to the SEC for examination and report.[26] Although the SEC's report is advisory only,[27] in making these reports it "has striven to obtain the inclusion of various provisions in these instruments which will assure to the investors a maximum of protection, adequate information with regard to the enterprise, and a fair voice in the management. . . ." [28]

Distribution of the Power To Control

Allocation of Voting Rights

The starting point of any system of shareholder participation will lie in a determination, through allocation of voting rights, of what classes of

19. 11 U.S.C. § 616(14) (1952).
20. 11 U.S.C. § 616(1) (1952).
21. 8 SEC Study 158-59 (1940).
22. 11 U.S.C. § 621(5) (1952).
23. 11 U.S.C. § 572 (1952).
24. If the scheduled indebtedness of the debtor exceeds $3,000,000. *Ibid.*
25. If the scheduled indebtedness of the debtor does not exceed $3,000,000. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. 10th Annual Report of the Securities and Exchange Commission 150 (1944).

securities will have power to control the corporation. A literal reading of chapter X reveals only a partial standard of allocation. Although section 216(12) requires that once the classes to have voting power are determined, there must be a "fair and equitable distribution of such power among such classes," nothing is said concerning how the initial determination of what classes will have voting rights is to be made.[29] A corporate governing system emphasizing informed shareholder participation would seem to require the same "fair and equitable" standard when the reorganization court reviews a plan making this initial determination.

In an economically sound corporation, the greatest risk-bearer will generally have the greatest power to control. Thus, voting power will be vested largely in the common shareholders,[30] with bondholders having few or no voting rights.[31] Between the two extremes would fall preferred shareholders.[32] But even in an economically sound corporation, it may be desirable to shift this distribution upon the occurrence of certain contingencies. Voting power might be granted to bondholders upon default or some other stipulated occurrence threatening their position,[33] or to preferred shareholders when their position is jeopardized by an event such as a dividend default.[34] For the most part, when dealing with reorganized corporations these same principles would be applicable, for it is contemplated that a corporation will emerge from reorganization with an economically sound capital structure.[35]

A reorganization plan granting contingent voting rights to preferred shareholders poses little legal difficulty since such a provision is specifically required by section 216(12).[36] The statute lays down the broad standard that such provisions be "adequate." Since a mere grant of some voting rights may prove only an illusory protection,[37] most reorganization plans have granted the preferred shares, upon default, either sole voting power,[38] or power to elect a majority of directors voting as a class.[39]

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29. 11 U.S.C. § 616(12) (1952).

30. See BERLE, STUDIES IN THE LAW OF CORPORATE FINANCE 45 (1928): "Common shareholders . . . have a direct interest in every corporate operation; their major hope of return lies in faithful and effective management. . . ."

31. The bondholders' interest in power to control is limited by the fact that they have secured to themselves, by mortgage or enforceable action at law, a set of independent controls on the corporation. *Id.* at 27, 45. Thus, the bondholders' interests are not nearly so dependent upon management as are those of the common shareholders.

32. *Id.* at 45. The interest of preferred shareholders in management should vary in proportion to the amount of contractual protection accorded them.

33. *E.g.*, a diminution of earnings or working capital below a certain point. See ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES 244 (1949).

34. See BALLANTINE, CORPORATIONS 419 (rev. ed. 1946).

35. Indeed, this is the very essence of the requirement of § 221(2), 11 U.S.C. § 621(2) (1952), that a reorganization plan be "feasible." See, *e.g.*, Central States Elec. Corp. v. Austrian, 340 U.S. 917 (1950).

36. 11 U.S.C. § 616(12) (1952).

37. See BALLANTINE, CORPORATIONS 419 (rev. ed. 1946).

38. See, *e.g.*, Penn Timber Co., 17 S.E.C. 107 (1944).

39. Childs Co., 26 S.E.C. 362 (1947) (preferred shareholders could elect majority of directors plus one if four quarterly dividends missed or sinking fund payment

In some cases preferred shareholders have not been limited to contingent voting rights, but have been granted full rights, amounting in one case to 36.7 per cent of the corporation's total vote.[40] Although it may be proper and desirable in some instances for the SEC and reorganization courts to approve plans granting preferred shareholders non-contingent voting rights,[41] this approval should be granted cautiously, with recognition that a voice in management is generally of a lesser interest to preferred shareholders than it is to common shareholders.[42] Thus, preferred voting rights should be limited generally to minority power.[43] This would seem to satisfy the requirement that a distribution of voting power among the securities selected be fair and equitable.[44]

In contrast to preferred shares, the statute makes no specific provision for granting contingent voting rights to bondholders. Such provisions might be fostered by the courts under the broad language of section 216(11),[45] requiring "equitable" provisions with respect to the manner in which directors are elected, or under the general requirement of section 221(2) [46] that any plan be "fair and equitable." Section 216(14),[47] which allows "any other appropriate provisions not inconsistent with the provisions of this chapter," might be used by the reorganization committee as a basis for the inclusion of such a provision in reorganization plans.

Although it may prove desirable to grant bondholders at least contingent voting rights, in some cases the SEC has gone beyond this, finding no fault with plans granting rather extensive noncontingent rights.[48] This approval apparently is a reflection of the feeling that bondholders are entitled to this extra protection because they have been forced into reorganization proceedings.[49] This outlook seems questionable. If the corporation

missed); Sayre & Fisher Brick Co., 10 S.E.C. 64 (1941) (preferred shareholders could elect majority of directors after four semi-annual dividends missed, whether or not consecutive); McKesson & Robbins, Inc., 8 S.E.C. 853 (1941) (preferred shareholders could elect majority of directors as class if eight consecutive dividend defaults occurred).

40. Childs Co., 26 S.E.C. 362 (1947). See also Penn Timber Co., 17 S.E.C. 107 (1944); Sayre & Fisher Brick Co., 10 S.E.C. 64 (1941).

41. This would be especially true in cases where the preferred shares represent a much greater equity in the reorganized corporation than that represented by common shares.

42. See BERLE, *op. cit. supra* note 30, at 45.

43. *But see* Higbee Co., 8 S.E.C. 777 (1941) (preferred shareholders could elect three out of seven directors, while common shareholders could elect only three, until seven-year notes were retired, then four; holders of seven-year notes elected seventh director until the notes were retired).

44. 11 U.S.C. § 616(12) (1952).

45. 11 U.S.C. § 616(11) (1952). See text accompanying note 16 *supra.*

46. 11 U.S.C. § 621(2) (1952). See text accompanying note 15 *supra.*

47. 11 U.S.C. § 616(14) (1952).

48. See, *e.g.*, Reynolds Investing Co., 6 S.E.C. 699 (1940) (debentures could elect three of five directors so long as asset value of debentures outstanding was less than 200% of par; if more than 200% of par, then only two directors were to be elected by debentures).

49. In some situations, however, approval might be motivated because voting rights are attached to a new bond issue. If it is necessary to do this in order to attract new capital, such approval appears proper. See, *e.g.*, San Francisco Bay

emerges with a sound capital structure, as it must in order for the plan to be feasible,[50] there seems to be little reason to grant bondholders extensive voting powers. At most, they should be allowed minimal representation on the board of directors.[51]

Once the allocation of voting rights has been made, the SEC has displayed strong concern that it not be disrupted through the future issuance of voting securities to a new group of individuals. Thus, approval was denied a plan failing to make provision for pre-emptive rights,[52] apparently based upon chapter X's "fairness provision." [53] At one point, this concern was so strong that a plan allowing waiver of pre-emptive rights upon approval of three-quarters of the stock voted was disapproved.[54] However, a recognition that pre-emptive rights in certain circumstances may impede or delay the raising of new funds has led the SEC to approve a plan limiting such rights to new issues not offered for sale to the general public.[55]

Methods To Insure Realization of the Power To Control

The Board of Directors

One of the basic means of granting shareholders an effective power to control is to make possible the election of a board of directors that will be responsive to shareholder desires. In this way shareholders can have an indirect control over daily management activities, yet not interfere with efficient management. The role of shareholder participation here might be to allow election of a truly representative board, and to prevent such a board from entrenching itself and making removal overly difficult when it is no longer responsive to shareholder desires.

1. Selection of the Initial Board of Directors

The initial board of directors of a reorganized corporation is usually appointed by the court from a list of nominees.[56] In many plans nomina-

Toll-Bridge Co., 6 S.E.C 863 (1940) (class A stock, which held 98% of voting power, placed in trust with indenture trustee for new bond issue for ten years; SEC found no fault, other than suggesting it would be more appropriate to gain bondholder control by attaching class A stock to the bonds) (plan disapproved on other grounds).

50. See note 35 *supra*.

51. See, *e.g.*, Kushin Freight Lines, Inc., 29 S.E.C. 724 (1949) (one out of five directors elected by serial and junior notes) (plan disapproved on other grounds); Atlas Pipeline Corp., 9 S.E.C. 416 (1941) (bondholders could elect one of eleven directors) (plan disapproved on other grounds).

52. See, *e.g.*, International Ry. Co., 29 S.E.C. 555 (1949). "The pre-emptive right to subscribe to new securities is a basic right which inures to the benefit of the individual stockholder by enabling him to maintain and protect his relative position in the company." *Id.* at 584.

53. See Inland Gas Corp., 36 S.E.C. 224, 235 (1955).

54. Childs Co., 26 S.E.C. 362 (1947). The SEC said, however, it would approve a waiver in the case of an issue offered to the general public.

55. Inland Gas Corp., 36 S.E.C. 224, 235 (1955).

56. Silesian-American Corp., 31 S.E.C. 1, 70 (1950). This practice apparently springs from § 221(5), 11 U.S.C. § 621(5) (1952), which requires court approval of initial directors and officers.

tions can be submitted by any group in interest, without any attempt being made to determine the number of directors to be selected by the court from a particular group's nominees,[57] while others limit nominations to particular groups, such as creditors,[58] debenture holders and preferred shareholders.[59] Some plans include in the plan itself the names of those to be appointed.[60] A general tendency in these latter plans is toward selection of directors representing special groups.

In view of the tendency of management to perpetuate itself,[61] the selection of the initial board of directors, which in turn will generally select the initial officers, should be given careful consideration by the reorganization courts. Under an ideal system of shareholder participation the nominees would be selected proportionately by the groups in which voting power is vested.[62] Otherwise, for at least the first year, and to a lesser degree in later years, the directors and officers will not necessarily be entirely responsive to the desires of those parties with the greatest interest in proper management. In most situations, this ideal could be reached with little administrative difficulty, since nominations could be made by protective committees representing the various groups.[63] Where a particular group is not represented by such a committee, individual members of the group might be allowed to make nominations if it would prove impractical to have the whole group polled for its nominees.

To some degree, the SEC has exhibited cognizance of the problem of determining which groups shall have nominating power. It has suggested that control of the initial board of directors should not be vested as a matter of course in those persons promulgating the plan,[64] and has advised amendment of the plan to correlate nominating power to permanent voting power.[65]

An equitable distribution of the power to nominate would seem to be required by section 221(5) [66] which states that the judge shall not confirm a plan unless he is satisfied that the identity, qualifications and affiliations of directors and officers are "equitable, compatible with the interests of the creditors and the stockholders and consistent with public policy." Thus, it would not seem proper for a court to approve a plan in which all of those

57. See, *e.g.*, Broadway-Exchange Corp., 15 S.E.C. 256, 261 (1944); Philadelphia & Reading Coal & Iron Co., 10 S.E.C. 714, 725 (1941).

58. Inland Gas Corp., 33 S.E.C. 688, 713-14 (1952).

59. Central States Elec. Corp., 30 S.E.C. 680, 693 (1949).

60. San Francisco Bay Toll-Bridge Co., 6 S.E.C. 863, 867 (1940).

61. See Garrett, *Attitudes on Corporate Democracy—A Critical Analysis*, 51 Nw. U.L. Rev. 310 (1956).

62. This posits that there has been an equitable distribution of voting power. See text and note above and below note 29 *supra*.

63. The court should examine the affiliations of these nominees closely, however, for those in control of the reorganization may attempt through this means to gain control of management. See 1 SEC Study 863-64 (1937).

64. Sayre & Fisher Brick Co., 10 S.E.C. 64, 76 (1941).

65. Silesian-American Corp., 31 S.E.C. 480, 482 (1950); International Ry. Co., 29 S.E.C. 555, 556 (1949).

66. 11 U.S.C. § 621(5) (1952).

to be appointed directors are affiliated or identified with a single group, unless that particular group had the sole interest in the enterprise. Furthermore, the court might also examine the proposed directorate in an effort to ascertain whether the nominees are fairly representative of various factions within a particular group. If a plan allows nominations by any group in interest and places the entire burden of selection upon the court, the final selection should be guided by the principle of fair representation of various classes and the different factions within a class. It might be said that only such a selection, where possible, is equitable and compatible with the interests of the stockholders.

2. Permanent Methods of Electing the Board of Directors

Although the reorganization court has extensive control over the make-up of the initial management, attempts to seek court supervision after the reorganization plan becomes operative have met with little success.[67] Therefore, to insure a system of shareholder participation it becomes important that the plan contain adequate provision for maintaining proportional representation of various interests on the board of directors after it becomes operative.

A proper allocation of voting power will not necessarily result in proportional representation on the board of directors. Under ordinary voting procedures it is possible for a bare majority of votes to elect the entire board of directors, resulting in no representation on the board for strong minority groups.[68] Thus, in some instances, an entire class might be excluded, or, in others, a powerful minority faction within a class would be denied adequate representation. One method of attempting to insure proportional representation would be the institution of class voting procedures. A few reorganization plans have provided that each class of securities, voting as a class, be able to elect a stated number of directors.[69] Although such a provision may lead to proportional representation of the various classes, it would fall short of insuring proportional representation of minority factions within a class. This shortcoming gives rise to the need for a more comprehensive device: cumulative voting. Under such a system, assuming an allocation of one vote per share, each shareholder would be able to cast a number of votes equal to the number of his shares multiplied by the number of directors to be elected.[70] All such votes can be cast for a single director, or can be distributed over a number of directors.[71] This device will enable minority voting power to be concentrated, tending to result in a more representative board of directors than might normally evolve from ordinary voting procedures.[72]

67. See, *e.g.*, Reese v. Beacon Hotel Corp., 149 F.2d 610 (2d Cir. 1945).
68. See BALLANTINE, CORPORATIONS § 177 (rev. ed. 1946).
69. See, *e.g.*, Inland Gas Corp., 29 S.E.C. 377, 400 (1949).
70. ARANOW & EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 295 (1957).
71. *Ibid.*
72. See BALLANTINE, CORPORATIONS § 177 (rev. ed. 1946).

Although some fear has been expressed that cumulative voting may result in an over-representation of minority groups,[73] it has been suggested that, in view of the number of safeguards available to majority groups,[74] this danger is probably more imaginary than real,[75] and cumulative voting may be a very helpful device where needed.[76] This latter view has been adopted by the SEC, as evidenced by its consistent position that reorganization plans should provide for cumulative voting,[77] basing this position upon the broad "fairness" provision of section 221(2).[78]

One method of reducing the effectiveness of cumulative voting is the practice of classifying boards of directors.[79] A classified board is one in which the directors are divided into a number of classes, only one class coming up for election each year,[80] thus reducing the number of vacancies to be filled at each election. As the number of vacancies decreases, the effectiveness of cumulative voting also decreases, since a larger number of shares will be necessary to insure the election of one director.[81] Furthermore, if a group is attempting to gain majority control, this goal will not be attained as quickly as it would if the board were not classified.[82] Apparently none of the plans submitted for SEC approval have contained classification measures, for an examination of SEC opinions reveals no discussion of the problem. However, it would seem that in light of the SEC's sensitivity to the desirability of cumulative voting, it would not approve such a plan.

Control Over Proxy Solicitations

One of the major threats to effective informed shareholder participation lies in proxy solicitation procedures.[83] The corporation laws of almost every state permit shareholders to cast their vote either in person or by

73. ARANOW & EINHORN, *op. cit. supra* note 70, at 299. The primary danger lies in a majority group's failure to cumulate voting power or to cumulate it in a faulty manner.

74. *E.g.*, minority proxy solicitations will indicate the necessity for the majority to cumulate its power, as will nomination of minority candidates and the possible requirement of advance notice of intent to accumulate. Furthermore, a voting group may be empowered to change its ballot. *Id.* at 300-02.

75. *Id.* at 300. See also Garrett, *supra* note 61, at 326.

76. *Ibid.* For a complete discussion of pros and cons of cumulative voting, *compare* Young, *The Case for Cumulative Voting*, 1950 WIS. L. REV. 49, *with* Axley, *The Case Against Cumulative Voting*, 1950 WIS. L. REV. 278.

77. See Inland Gas Corp., 33 S.E.C. 688, 689 (1952); Silesian-American Corp. 31 S.E.C. 1, 70 (1950); International Ry. Co., 29 S.E.C. 555, 556 (1949); Flour Mills of America, Inc., 7 S.E.C. 1, 25 n.77 (1940).

78. Inland Gas Corp., 33 S.E.C. 688, 689 (1952). See text accompanying note 15 *supra.*

79. ARANOW & EINHORN, *op. cit. supra* note 70, at 312.

80. *Id.* at 310.

81. See BALLANTINE, CORPORATIONS § 177 (rev. ed. 1946).

82. ARANOW & EINHORN, *op. cit. supra* note 70, at 313.

83. See Garrett, *supra* note 61, at 312. For an extensive discussion of the relationship between proxies and shareholder democracy, see Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653 (1951).

proxy.[84] Since personal attendance at shareholder meetings is usually sparse,[85] voting by proxy may become the only effective manner in which the shareholder can exercise his vote.[86] On the other hand, an improper use of this machinery may serve as the major tool for the practical disenfranchisement of shareholders.[87] In the absence of adequate legislative controls such as those discussed below, existing management can gain complete control over this machinery, thereby not only insuring its own reelection, but also insuring that its own policies will be followed.[88]

The most significant development in the control of proxy solicitation has been the promulgation of proxy rules by the SEC under authority of the Securities and Exchange Act of 1934.[89] The purpose of these regulations is to insure full disclosure, enabling the intelligent use of voting power by shareholders in both electing directors and voting on major policy issues, as well as to allow a shareholder the opportunity to present proposals for consideration by his fellow shareholders through the medium of the management proxy statement.[90] However, these rules do not encompass all corporations, but are limited both by the enabling legislation and the rules themselves.[91] The major limitation, that a company is not subject to the rules unless it is "listed" on a national securities exchange, excludes roughly half the large corporations in the United States.[92] Since the coverage of the SEC proxy rules and regulations is not so broad as to include all corporations subject to the provisions of chapter X,[93] there is a substantial possibility that a corporation will emerge from reorganization with insufficient control over proxy solicitations. In the absence of applicable legislation, such control might be included in the corporation's own charter. Such internal regulation might be suggested by the SEC and required by the bankruptcy courts. This approach could be based on either one of two chapter X provisions: a reorganization plan without proxy controls might be said to lack compliance with the fairness requirements of section 221(2),[94] or it could be considered as not including a provision that is equitable to stockholders with respect to the manner of

84. BALLANTINE, CORPORATIONS 408 (rev. ed. 1946).

85. Among the reasons given for sparse attendance are the wide diffusion and large number of shareholders, inconvenient location of meetings, and the general apathy of shareholders. See Caplin, *supra* note 83, at 655.

86. *Ibid.*

87. See BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 244-45 (1932); ROHRLICH, THE SCHOOLS OF CORPORATE REFORM 2 (1950).

88. See Garrett, *supra* note 61, at 312.

89. 48 Stat. 895 (1934), 15 U.S.C. § 78n (1952).

90. See ARANOW & EINHORN, *op. cit. supra* note 70, at 82.

91. *Id.* at 84.

92. See Bayne, *Around and Beyond the SEC—The Disenfranchised Stockholder*, 26 IND. L.J. 207, 223 (1951).

93. The Bankruptcy Act contains no limitation based upon size of corporations subject to its provisions.

94. 11 U.S.C. § 621(2) (1952). See text accompanying note 15 *supra*.

selection of persons who are to be directors, within the meaning of section 216(11).[95]

Although the avenue for internal regulation could be considered open, neither the bankruptcy courts nor the SEC have availed themselves of this opportunity. This failure might be attributed to a hesitancy to use a "back-door" approach through the bankruptcy power when the front door has been open to Congress through the commerce power. This would be especially true since Congress, through the Securities and Exchange Act of 1934, has chosen to limit the jurisdiction of proxy solicitations only to certain classes of corporations. Since there is some indication that coverage of the SEC proxy rules and regulations will be increased, any dangers to an ideal system of shareholder participation inherent in the absence of such provisions may soon be diminished. A proposed amendment would increase coverage to include companies with assets of over $2 million and more than 750 stockholders or $1 million in debt securities.[96] Admittedly this will still leave a limited number of fairly large corporations emerging from reorganizations that are not covered by proxy legislation. However, the problem of proxy solicitations, as noted above,[97] becomes acute only when there are a large number of shareholders widely diffused, with a resulting sparse attendance at shareholder meetings. This situation might be alleviated by an insistence on the part of reorganization courts that the place of shareholder meetings be set where convenient to the greatest number of shareholders or that the reorganized corporation's charter include provisions governing proxy solicitation as discussed above.

Voting Trusts

One of the most effective means of reducing the realization of the shareholders' power to control is use of the voting trust.[98] Under a voting trust agreement, a group of trustees, often a part of management, is formed and vested with complete power to vote all stock placed in trust with it.[99] These agreements have met with diverse treatment in state courts. While a minority have held them illegal per se,[100] the prevailing view is that they

95. 11 U.S.C. § 616(11) (1952). See text accompanying note 16 *supra.*

96. S. 1168, 85th Cong., 1st Sess. (1957). The SEC has already indicated its approval of this bill in connection with an earlier legislative attempt with similar provisions, S. 2054, 84th Cong., 1st Sess. (1955). See REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON S. 2054 TO THE COMMISSION ON BANKING AND CURRENCY (1956).

97. See text accompanying note 85 *supra.*

98. See BERLE & MEANS, *op. cit. supra* note 87, at 77. "[T]he security holder who enters one of these voting trusts or liquidation trusts has for all practical purposes relinquished any real control which he may have formerly had. He is eliminated from the picture when it comes to proxy formulation; he has at best a negative power to dissent under certain circumstances and only a cumbersome and unwieldy power to remove trustees or to terminate the trust if he thinks the proper policies are not being pursued. For all practical purposes he is out of control of the situation; the trustees are in a position of absolute power and dominion." 3 SEC STUDY 205 (1936).

99. BERLE & MEANS, *op. cit. supra* note 87, at 77.

100. See BALLANTINE, CORPORATIONS 425-26 (rev. ed. 1946).

are valid even in the absence of enabling statutes, except where an improper motive or objective is shown.[101]

The SEC, citing the requirement of section 216(11) [102] that a plan contain fair and equitable voting provisions, and the prohibition of section 216(12) [103] against issuing non-voting stock, has exhibited a tendency toward adopting a prohibitive view. This attitude is reflected by its disapproval of a plan containing a ten-year voting trust which required the vote or written consent of the majority of the holders of voting trust certificates for such important matters as sale of assets, consolidation, merger, liquidation except under certain circumstances, or settlement of specified claims.[104] Although it did not specifically object to voting trusts in a few plans predicated upon special needs,[105] in a recent pronouncement it disapproved a plan with a voting trust allegedly based upon the desire to enable the stock to be held intact for delivery to a purchaser of the reorganized corporation in the event the purchaser desired to acquire the capital stock of the company rather than its assets generally.[106] The SEC suggested that if the only purpose of the trust was to facilitate sale of the capital stock of the reorganized corporation, the plan could be amended to provide for an escrow agreement, with shareholders receiving temporary negotiable instruments evidencing ownership and carrying full voting rights.[107] Thus, sale could be facilitated, but the shareholders could retain the right to determine whether the company should be sold.[108]

Reorganization courts have not taken the same position on voting trusts as has been adopted by the SEC. The courts, holding that voting trusts neither violate the prohibition of the issuance of non-voting shares,[109] nor render a plan unfair or impair its feasibility,[110] have approved these agreements over objections raised by the SEC. In the leading case of *In re Quaker City Storage Co.*,[111] despite the SEC's refusal to approve the plan, the court granted approval, saying "the assurance of a continuance of

101. *Id.* at 426.

102. 11 U.S.C. § 616(11) (1952). See text accompanying note 16 *supra.*

103. 11 U.S.C. § 616(12) (1952). See text accompanying note 17 *supra.*

104. Silesian-American Corp., 31 S.E.C. 1, 32 (1950).

105. See Central States Elec. Corp., 30 S.E.C. 680, 693 (1949) (voting trust to be instituted if necessary to effectuate merger); Mortgage Guar. Co., 8 S.E.C. 499, 511 (1941) (ten-year voting trust with plan for eventual liquidation; two-thirds vote of trust certificates could terminate existing management and two-thirds vote could compel immediate sale of corporate property).

106. Inland Gas Corp., 33 S.E.C. 688, 727 (1952). However, the voting trustees were actually empowered to vote stock held by them for the election of directors and in connection with any other matter which might otherwise be subject to action by the stockholders.

107. *Ibid.*

108. *Id.* at 728. A plan so amended was approved. Inland Gas Corp., 34 S.E.C. 624 (1953).

109. *In re* Quaker City Cold Storage Co., 71 F. Supp. 124, 131 (E.D. Pa. 1947).

110. *In re* Lower Broadway Properties, 58 F. Supp. 615 (S.D.N.Y. 1945).

111. 71 F. Supp. 124 (E.D. Pa. 1947).

good management is essential, and this is provided through a voting trust." [112]

The holding of the *Quaker City* case does not necessarily mean, however, that courts will give blanket approval to voting trusts. Recognizing that they are "undemocratic," the court said, by way of dictum, that they should be employed sparingly and only when special circumstances require.[113] The special circumstances deemed adequate in *Quaker City* were that the great body of bondholders and preferred shareholders in the reorganized corporation were inexperienced in managing this type of enterprise, having never before exercised any voice in the management of the company. The former controlling group would get twenty-five per cent of the voting power, with the rest widely distributed to 700 individuals, thus making likely the reversion of actual control to a strong minority.[114] Furthermore, there was a good deal of protection afforded the shareholders in the trust agreement. Periodic reports were to be made, a referendum was required on matters of major importance, and the trust could be terminated on vote of the majority of outstanding voting trust certificates.[115] Accepting the court's conclusion that the special circumstances were adequate in light of the strong safeguards to security holders, the *Quaker City* plan presented a strong case for approval. What might be done in a weaker factual situation remains open to speculation.

In cases where voting trusts have been approved, the reorganization courts have not left the shareholder interests entirely at the whim of the trustees. The voting trustees are subject to the broad trust doctrine prohibiting them from exercising granted powers "in a way that is detrimental to the cestuis que trustent." [116] The court has considered its approval of the voting trust to create "what was, in effect, a contract with the court and creditors" that the trustee will act properly.[117] Thus an accounting was ordered in a case where the trustees failed to adequately perform their duties,[118] and the court, in another case, struck down an attempted amendment of the corporation's charter to extend control by the trustees, even though the trust agreement allowed the trustees to vote on charter amendments.[119]

Conclusion

An examination of the legislative history of the chapter X provisions under which forms of shareholder participation might be promulgated by

112. *Id.* at 128.

113. *Id.* at 131.

114. *Id.* at 130-31. Although the court deemed these circumstances special, it is questionable whether these same problems do not appear in almost any corporation, at least to some degree.

115. *Id.* at 131.

116. Brown v. McLanahan, 148 F.2d 703, 706 (4th Cir. 1945).

117. *In re* Dale Transp. Lines, Inc., 50 F. Supp. 91, 92 (W.D. Pa. 1943).

118. *Ibid.*

119. Brown v. McLanahan, 148 F.2d 703 (4th Cir. 1945).

reorganization courts reveals little indication of their real purpose. One possibility is that they were meant to give the court a negative control, *i.e.*, to prevent reorganization from being used as a tool by the reorganization committees to seize control of the emerging corporation. On the other hand, a strong possibility is that they were meant to grant reorganization courts discretionary power to institute an extensive affirmative program of shareholder participation. If the latter was their purpose, the question still remains whether Congress has properly acted within the scope of the bankruptcy power in fostering such an affirmative program. The answer to this problem will largely depend upon the causal connection between shareholder participation and the broad policy objectives of chapter X—the rehabilitation rather than liquidation of insolvent corporations.[120] If shareholder participation will aid the prevention of recurring ineffective management, thus supporting rehabilitation, it would then appear to be a proper area for congressional activity under the bankruptcy power. But, if the sole basis for adopting forms of shareholder participation lies in the policy determination that as a matter of fairness shareholders should have control over how their capital is used, this would not seem to be a proper area for federal control under the bankruptcy power.

The precise causal connection between minority representation (which is the goal of equitable distribution of voting power[121] combined with cumulative voting and a prohibition against classified boards of directors) and a decrease of ineffective management is difficult to ascertain. There is no doubt that the advocates of minority representation base their position in part upon a sense of fairness.[122] However, this is not the sole reason put forth. Minority representation is said to serve "not only as a brake on inefficiency and mismanagement, but as an incentive for better performance by those in power."[123] More specifically, advocates of minority representation claim sounder business decisions will be reached because a vigilant minority is on hand to constantly scrutinize majority proposals and test their soundness before action is taken.[124] Fewer mistakes, it is said, will be made by a management faced with the necessity of explaining its activities to critical minority shareholders.[125] However, these arguments have not remained unanswered. In opposition, it is claimed that directors should work as a team for the benefit of all and not be composed of separate

120. See 81 CONG. REC. 8679 (1938).

121. Minority representation on the board of directors is not the sole reason for an equitable distribution of the power to vote. It would also lead to a more representative decision on matters determined by direct shareholder vote, such as those raised by proxy proposals.

122. See, *e.g.*, Steadman, *Should Cumulative Voting for Directors Be Mandatory?—A Debate*, 11 BUS. LAW. 9, 11 (Nov. 1955): "The fact is that the principle of minority representation is deeply ingrained in American thinking and is a part of the American concept of fair play."

123. Young, *The Case for Cumulative Voting*, 1950 WIS. L. REV. 49, 54.

124. *Id.* at 53.

125. *Ibid.*

representatives of minority interests, thus creating friction.[126] Furthermore, it is argued, the majority and management will be put under strong psychological pressure to avoid mistakes that the opposition could turn to its disadvantage, and thus long range planning and aggressive administration may suffer through consequent overcaution.[127]

Despite the difficulty of ascertaining this connection it would not appear prima facie unreasonable for Congress to conclude that decisions subjected to active criticism that can be brought about by minority representation will tend to be more sound. That Congress has reached this conclusion appears from the expressed purpose of section 216(11) [128]—to "direct the scrutiny of the court to the methods by which management of the reorganized corporation is to be chosen, so as to insure, for example, adequate representation of those whose investments are involved in the reorganization." [129] There is little reason to think this conclusion is likely to be attacked, for the burden of proving the lack of an adequate causal connection may prove quite difficult.

The ascertainment of the connection between other aspects of informed shareholder participation and increased corporate financial stability appears less difficult than that of minority representation on the boards of directors. Control over proxy solicitations and limitation of voting trusts to situations where their purpose is other than insulating management activities from shareholder disapproval will make removal of ineffective management less difficult. A requirement that meetings be held at a place convenient to the greatest number of shareholders would also lessen the effectiveness of management control over proxy machinery. A requirement allowing shareholder proposals to be made either on management proxies or at shareholder meetings would broaden sources of ideas and allow comparison of possible alternative courses of action.

The success of these devices will be partially dependent upon the intelligence and interest displayed by shareholders in exercising their powers. Critics of shareholder participation have questioned the realism of expecting small investors to take an active interest in the affairs of the corporation and their ability to make sound decisions in respect to questions of large-scale corporate operation.[130] However, advocates of shareholder participation suggest that there is much evidence that the shareholder is "being educated and experiencing an awakening of the breadth of his intellectual capacity

126. This is the principle argument made by many management proxies when the question of whether or not to adopt cumulative voting is put up for shareholder vote. For a summary of some of these management proxy statements, see Gibson, *Should Cumulative Voting for Directors Be Mandatory?—A Debate*, 11 BUS. LAW. 22, 26-28 (Nov. 1955).

127. WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 165 (1951).

128. 11 U.S.C. § 616(11) (1952).

129. S. REP. No. 1916, 75th Cong., 3d Sess. 35 (1938).

130. For a rather extreme statement of this position see Note, 53 HARV. L. REV. 1165, 1173 (1940): "[A] considerable body of security holders lack sufficient capacity to understand any phase of corporate activity, no matter how simply expressed. . . ."

for corporate as well as general understanding," [131] and that if shareholders are given the opportunity to exercise a real sense of control over the affairs of their companies, there would be renewed interest.[132] Again, as in the case of minority representation, it would not seem prima facie unreasonable for Congress to conclude there is a sufficient correlation between these matters and corporate financial stability to support controls erected under the bankruptcy power. On the other hand, since there is existing federal control over proxy solicitations enacted under the commerce power, it may be doubted that Congress intended to extend the discretionary power of the reorganization courts in this field.

A significant limitation of the effectiveness of a program of shareholder participation instituted under the reorganization court's discretionary powers, however, may lie in the court's inability to prevent a change in a corporation's form of management and selection of management once the court has made a final confirmation of the plan. Although it may be proper for the court to exercise jurisdiction to insure that the corporation is formed in accordance with the approved plan, there is no indication that Congress desired judicial supervision once the plan becomes operative.[133] However, this limitation would not completely negate judicial activity in the area. At the very least it would prevent reorganization proceedings from being used as a means of vesting power to control the corporation in a particular group. In addition, once the power to control is granted to shareholders, the onerous burden of moving forward to abrogate forms of shareholder participation would be placed upon management.

I. J. W.

131. EMERSON & LATHAM, SHAREHOLDER DEMOCRACY 10 (1954).

132. See Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 656 (1951).

133. *Cf.* FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATIONS IN BANKRUPTCY 451-52 (1937). Speaking of feasibility under the old § 77B, the author says, "While the most complete control by the court of the original set-up of the reorganized company is proper, any reservation to the court of operating control after the plan is effected seems to go beyond the purpose of the act." *Id.* at 452.